MALAYSIAN BAR

v.

TAN SRI DATO' ABDUL HAMID OMAR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 08-21-89]
28 APRIL 1989

CIVIL PROCEDURE: *Committal Proceedings - Malaysian Bar sought leave to apply for an order for the committal to prison of Tan Sri Dato' Abdul Hamid bin Omar, the respondent - Alleged contempt of Court - Allegation is that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia - Whether proper case for leave to be granted - Lapse of time in filing application unexplained.*

LEGAL PROFESSION: *Locus Standi - Whether Malaysian Bar has locus standi to bring the proceedings against the respondent - Section 42(1) (a) of the Legal Profession Act.*

CIVIL PROCEDURE: *Supreme Court - Sitting of Supreme Court on 2 July 1988 - Whether sitting contravened, ss. 38, 39 of Courts of Judicature Act.*

The Malaysian Bar sought leave to apply for an order for the committal to prison of Tan Sri Dato' Abdul Hamid bin Omar, who is presently the Lord President of the Supreme Court, the respondent, for alleged contempt of Court committed on 2 July 1988 where it was alleged in the affidavit of Manjeet Singh Dhillon the Secretary of the Bar Council of the Malaysian Bar, that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia on 2 July 1988.

Held:

[1] The Supreme Court had dealt with the law of *locus standi* that should be applied in this country and this is laid down in the majority judgment in *Government of Malaysia v. Lim Kit Siang.*

[2] The principle to determine the *locus standi* of a party in a proceedings is as laid down in *Boyce v. Paddington Borough Council* as approved by the House of Lords in *Gouriet's*. The plaintiff must first establish that he qualifies as a person entitled to be a party to the proceedings. In a proceeding for contempt the qualification of "sufficient interest" in *Arthur Lee Meng Kwang* must be read together with the majority judgment in *Lim Kit Siang*.

[3] As there was no lawful sitting of the Supreme Court on 2 July 1988 it may even be argued that the respondent was perfectly entitled to prevent an unauthorised sitting of the Supreme Court in contravening of ss. 38 and 39 of the Courts of Judicature Act. What amounts to contempt are acts done calculated to obstruct or interfere without the lawful process of the Court.

[4] There has certainly been an inordinate delay in making the application for leave and there was no explanation for the delay in the affidavit of the Secretary of the Bar.

[5] As the allegations of contempt is a serious matter, it should have been pursued within a reasonable time. A lapse of nearly nine months unexplained in the affidavit is not reasonable.

[6] As this is not a proper case where leave should be granted, the motion was dismissed.

[Motion dismissed.]

Cases referred to:
Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ (Rep) 63
Boyce v. Paddington Borough Council [1903] 1 Ch 109
Gouriet's [1977] 3 All ER 70; [1978] AC 435
Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] CLJ (Rep) 58
Raymond v. Honey [1982] 1 All ER 756

Legislation referred to:
Courts of Judicature Act 1964, ss. 9(1), 38, 39
Rules of the Supreme Court [UK], O. 53
Federal Constitution, art. 125(3)
Legal Profession Act 1976, s. 42(1)(a)
Rules of the High Court 1980, O. 52 r. 2(2)
Supreme Court Act 1981 [UK], s. 31

For the applicants - Y.M. Raja Aziz Addruse (S. Thevanthiran, Lee Min Choon, Matthias Chang, Gurubachan Singh, Nashir Johal, Collin Sequerah & Jeffrey Fernandez with him); M/s. Suhaimi Khor Zulkifli & Chang, M/s. Lee, Perara & Tan, M/s. Jackson & Masacorale, M/s. Fernandez & Co., M/s. Nashir Johal & Co., M/s. C.L. Sequerah & Co.
For the respondent - Tan Sri Abu Talib bin Othman, Attorney-General Malaysia (T. Selventhiranathan, Senior Federal Counsel with him)

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

In this proceeding, the applicant, the Malaysian Bar, is seeking leave to apply for an order for the committal to prison of Tan Sri Dato' Abdul Hamid bin Omar, the respondent, for alleged contempt of Court committed on 2 July 1988 where it is alleged that the respondent attempted to prevent, frustrate and interfere with the sitting of the Supreme Court of Malaysia.

The background facts which resulted in the present proceeding are exhaustively set out in the report of the Tribunal appointed by His Majesty the Yang di-Pertuan Agong under Article 125(3) of the Federal Constitution, a copy of which was annexed to the affidavit of Manjeet Singh Dhillon, Secretary of the Bar Council of the Malaysian Bar. For the purpose of this judgment the background facts may be briefly stated as follows. At the material time Tun Salleh was suspended as Lord President and was facing an enquiry before a Tribunal appointed under Article 125(3) of the Constitution. On 26 August 1988 Tun Salleh made an application to the High Court in Kuala Lumpur (Originating Motion No. R8-32-79-88) for leave to apply for an order of prohibition against members of the Tribunal of whom the respondent was one. That application was partly heard in the High Court before Mr. Justice Dato' Ajaib Singh who, on the morning of 1 July 1988 adjourned the matter to the afternoon; and in the afternoon adjourned it to 2 July 1988 for decision. When the matter came for decision on 2 July 1988 the learned Judge in a written judgment decided to further adjourn the same to 4 July 1988 to enable the Attorney-General to make submissions. The learned Judge refused an oral application for a limited stay until 4 July 1988. Shortly thereafter leading Counsel for Tun Salleh together with some other lawyers saw a Supreme Court Judge, Tan Sri Wan Suleiman, and requested him to convene a special sitting of the Supreme Court to hear an application to preserve the *status quo*. Supreme Court Judge, Tan Sri Wan Suleiman, purporting to act under s. 9(1) of the Courts of Judicature Act 1964 thereupon without the

knowledge and consent of the respondent who was then Acting Lord President convened a special sitting of the Supreme Court consisting of five Judges. The sitting commenced at about 12.50 p.m. and Counsel for Tun Salleh made an oral application for stay. After a hearing which lasted for about 30 minutes and a short adjournment for deliberation, the five Judges unanimously made an order for limited stay restraining the Tribunal from submitting its report, recommendation and advice to His Majesty the Yang di-Pertuan Agong until further order.

In the present application for leave the particulars of the alleged acts said to constitute the contempt were set out in the statement pursuant to O. 52 r. 2(2) and Rules of the Supreme Court, r. 4 appearing under "grounds" as follows.

(a) On 2 July 1988, the respondent being a party to Kuala Lumpur High Court Originating Motion No. R8-32-79-88 and anticipating an appeal or application by the opposite party in the said proceedings to the Supreme Court instructed the staff of the Registry of the Supreme Court that in the event of such appeal or application being filed no action should be taken without directions from the respondent;

(b) subsequently, on learning that an application as anticipated was actually filed, the respondent gave instructions to the Chief Registrar of the Supreme Court that the Court rooms should be kept closed, that the staff should not assist in such sitting, that neither the Chief Registrar nor any other Senior Assistant Registrar was to sign any order that might be made and that the Court seal should not be made available.

One of the points raised before us in this proceeding is the *locus standi* of the applicant. In our view it is questionable whether the applicant has *locus standi* notwithstanding s. 42(1)(a) of the Legal Profession Act which states that the purpose of the Malaysian Bar shall be "to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour." It is only recently that this Court had dealt with the law of *locus standi* that should be applied in this country and this is laid down in the majority judgment in *Government of Malaysia v. Lim Kit Siang* [1988] 1 CLJ (Rep) 63. Briefly the position as to the law of *locus standi* in this country is as follows:

(1) The principle to determine the *locus standi* of a party in a proceeding is as laid down in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 as approved by the House of Lords in *Gouriet's* case [1977] 3 All ER 70; [1978] AC 435.

(2) The rule as to *locus standi* applicable in Malaysia is that accepted in England before the enactment of O. 53 of the English Rules of the Supreme Court. Since we have not accepted O. 53 and its statutory underpinnings (i.e. s. 31 of the Supreme Court Act) there is no justification to depart from the rule of *locus standi* accepted by the highest Court in England prior to O. 53.

Ours is a conservative approach to *locus standi* but that is the law as it stands now. Until a change is made in the law a plaintiff must first establish that he qualifies as a person entitled to be a party to the proceeding. In a proceeding for contempt the qualification of "sufficient interest" in *Arthur Lee Meng Kwang* [1986] CLJ (Rep) 58 must be read together with the majority judgment in *Lim Kit Siang*.

However, even assuming for a moment that the applicant has *locus standi* having regard to the facts set out in the statement, affidavit and the report of the Tribunal annexed to the affidavit we do not consider this to be a proper case where leave should be granted. We say this for the following reasons.

The Tribunal dealt with the sitting of the five Supreme Court Judges on 2 July 1988 and after considering ss. 38 and 39 of the Courts of Judicature Act came to a finding that "the Supreme Court which sat on 2 July 1988 was convened in contravention of ss. 38 and 39 of the Courts of Judicature Act" and in the result "the Court was not a lawfully constituted Court and so has no jurisdiction to make the purported order for interim stay'. See pp. 6 to 9 of the report of the Tribunal. Again at p. 73 of the report, the Tribunal found that the sitting of the five Judges was "illegal and without jurisdiction".

We have ourselves examined ss. 38 and 39 of the Courts of Judicature Act and we have come to the same view i.e. the sitting on 2 July 1988 was in contravention of ss. 38 and 39 of the Courts of Judicature Act. In our view it is the Lord President alone or any person acting as Lord President who is entitled to convene and to empanel Judges to constitute the Supreme Court for any sitting, whether scheduled or unscheduled. The powers of the Lord President of any person acting as Lord President under ss. 38 and 39 of the Act are express statutory powers which cannot be exercised by others unless properly exercised under s. 9(1) of the Act during illness or absence from Malaysia or owing to any other cause when the Lord President is unable to exercise the functions of his office. We read the words "any other cause" in s. 9(1) to relate to physical inability in the sense that the Lord President is unable to perform his functions.

There was thus no lawful sitting of the Supreme Court on 2 July 1988. So we have to ask the ultimate question - contempt of what? Indeed it may even be argued that the respondent was perfectly entitled to prevent an unauthorised sitting of the Supreme Court in contravention of ss. 38 and 39 of the Courts of Judicature Act. What amounts to contempt are acts done calculated to obstruct or interfere with the lawful process of the Court. See also the speech of Lord Wilberforce in *Raymond v. Honey* [1982] 1 All ER 756.

The facts set out in the affidavit on behalf of the Malaysian Bar and the report of the Tribunal would also seem to contradict the allegations contained in the grounds. The Judges went into Court at 12.50 p.m. which only means that the doors of the Court were not closed. They sat for about half an hour assisted by the staff of the registry although the Chief Registrar was absent. After the hearing they granted an order which bore the seal of the Supreme Court which only means that the seal was made available and not denied from them. In our view all these would compel us to come to one conclusion only and that is the instructions even if issued were never implemented.

Finally there has certainly been an inordinate delay in making the application. The resolution of the Malaysian Bar to institute proceeding for contempt was passed on 19 July 1988. The application for leave was filed on 24 April 1989. There was no explanation for the delay in the affidavit of the Secretary of the Bar. The allegations of contempt is a serious matter and should be pursued within a reasonable time. The delay must be explained. In our view a lapse of nearly nine months unexplained in the affidavit is not reasonable.

[Motion dismissed.]

CONSTITUTIONAL LAW: *Malaysian Bar applies for Committal proceedings against present Lord President - By notice of motion seeks an order or direction that Lord President of the Supreme Court do advise Yang di-Pertuan Agong to appoint such person or persons to be additional Judge or Judges of the Supreme Court to hear the contempt proceedings - Article 122(1A) of Federal Constitution - Mandamus - Whether Supreme Court has jurisdiction to make such an order - Mandamus - Whether direction or order in nature of*

mandamus - Alternative prayer - Committal proceedings be stayed pending application to Lord President for the same purpose - Objection by Malaysian Bar to all Supreme Court Judges from hearing committal proceedings.

By a notice of motion the Malaysian Bar moved the Supreme Court for an order or direction that the Lord President of the Supreme Court do advise the Yang di-Pertuan Agong pursuant to Article 122(1A) of the Federal Constitution to appoint such person or persons who have held high judicial office in Malaysia and whom the Yang di-Pertuan Agong in his absolute discretion deems fit to be an additional Judge or Judges of the Supreme Court to hear the Committal proceedings against the respondent. Alternatively, the Malaysian Bar sought for an order that the Committal proceedings be stayed pending an application to the Lord President under the same Article 122(1A) of the Federal Constitution for the same purpose.

Held:

[1] The Supreme Court has no power to order or direct the Lord President as to how he should exercise his constitutional functions under Article 122(1A) of the Federal Constitution.

[2] There was absolutely no reason for the panel of the Supreme Court Judges to disqualify themselves on the ground of bias or likelihood of bias.

[3] There is no reason to consider the alternative prayer for stay since the panel of the Supreme Court Judges are not disqualified from hearing the application for leave to apply for an order for the committal to prison of Tan Sri Dato' Abdul Hamid bin Omar, the respondent, for alleged contempt of Court.

[Notice of motion dismissed.]

JUDGMENT

Hashim Yeop A. Sani CJ (Malaya)

The Malaysian Bar took out a notice of motion to move the Court for an order or direction that the Lord President of the Supreme Court do advise the Yang di-Pertuan Agong pursuant to Article 122(1A) of the Federal Constitution to appoint such person or persons who have held high judicial office in Malaysia and whom the Yang di-Pertuan Agong in his absolute discretion deems fit to be an additional Judge or Judges of the Supreme Court to hear the committal proceedings against the respondent. Alternatively the Malaysian Bar sought for an order that the committal proceedings be stayed pending an application to the Lord President under the same Article 122(1A) of the Federal Constitution for the same purpose.

In the affidavit supporting the notice of motion, the Secretary of the Bar Council of the Malaysian Bar gave a summary of the grounds for objecting to all Supreme Courts Judges from hearing the committal proceedings. The summary of the grounds are contained in para. 3 of the affidavit as follows.

> 3. A brief summary of the grounds for objection in relation to the respective Supreme Court Judges are given below:
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> 3.1 The Honourable Tan Sri Dato' Abdul Hamid bin Hj. Omar - he is the defendant in this proceedings.
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> 3.2 The Honourable Chief Justice of Malaya Tan Sri Datuk Hashim Yeop Abdullah Sani, Dato' Harun Mahmud Hashim, Dato Mohamed Yusoff bin Mohamed and Datuk Gunn Chit Tuan - members of the panel of Supreme Court Judges who sat at the Supreme Court hearing on 21 and 22 July 1988 (*Tun Dato Haji Mohamed Salleh bin Abas v. Tan*

Sri Dato Abdul Hamid bin Omar & Ors. [1988] 3 MLJ 149) and who set aside the order of the Supreme Court dated 2 July 1988, the circumstances relating to which are connected to the committal proceedings herein.

3.3 The Honourable Mr. Justice Tan Sri Datuk Lee Hun Hoe - one of the defendants in the proceedings before the Supreme Court, which resulted in the said order of the Supreme Court of 2 July 1988.

3.4 The Honourable Mr. Justice Tan Sri Dato' Haji Mohamed Azmi bin Dato' Haji Kamaruddin and the Honourable Mr. Justice Tan Sri Dato Seri Dr. Eusoffe Abdoolcader - two of the Supreme Court Judges who heard the application and granted the said order of 2 July 1988 in the proceedings which were sought to be prevented by the respondent.

3.5 The Honourable Mr. Justice Dato Ajaib Singh - the Judge in the proceeding which was the subject matter of the application to the Supreme Court resulting in the said order of 2 July 1988.

In para. 4 of the same affidavit the Secretary of the Bar Council also stated that it would be improper for the Lord President or the Supreme Court Judge who is next most senior to him to appoint any High Court Judges to hear the committal proceedings.

Firstly on the question of disqualification. As regards the three of us here the only objection would seem to be that we sat on 21 and 22 July 1988 to consider the order of prohibition issued against the Tribunal. The Supreme Court which sat on the two days mentioned was only concerned with the legality or propriety of the order of prohibition. We were only concerned with questions of law and not concerned with the circumstances which brought about the committal proceedings.

Secondly it would seem clear from the affidavit on behalf of the Malaysian Bar that the applicant also considers that all the Judges of the superior Courts should be disqualified and that the only solution is to invoke Article 122(1A) of the Federal Constitution for the appointment of additional Judges of the Supreme Court by the Yang di-Pertuan Agong on the advice of the Lord President. This is an interesting point but frought with problems. Firstly Article 122(1A) speaks of "advice" of the Lord President. Therefore the Lord President is required, if he wants the Yang di-Pertuan Agong to appoint additional Judges. This obviously will not solve the problem posed by the applicant.

We also agree with Mr. Sri Ram (who was invited to address the Court) that a direction or order as requested by the applicant would be in the nature of a *mandamus* and the Supreme Court being essentially an appellate and referential Court has no jurisdiction to make such an order.

Finally we also do not think that the Supreme Court has the power to order or direct the Lord President as to how he should exercise his constitutional functions under Article 122(1A) of the Constitution.

In conclusion we do not consider that we should disqualify ourselves on the ground of bias or likehood of bias because there is absolutely no reason to do so.

As regards the alternative prayer for stay since we are of the view that we are not disqualified from hearing the application for leave, we see no reason to consider the alternative prayer for stay.

Notice of motion is accordingly dismissed.

Also found at [1989] 2 CLJ 373